In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 448

ANDREW KYRIACO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

This Court's opinion in *Donaldson* v. *United States*, No. 65, this Term, decided January 25, 1971, leaves no doubt, we submit, that the courts below correctly decided the present case on the record before them.

In their letter of December 11, 1970, however, petitioners call attention to the fact that some seven months after the court of appeals' decision in this case, criminal prosecution of two of the petitioners was recommended to the Department of Justice by the Internal Revenue Service. In our view, this new factual development is immaterial. The Court's opinion in *Donaldson* explicitly recognized that the critical question in these cases of alleged misuse of process is

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the validity of the *issuance* of the summons—whether, as here, it was "*issued* in good faith and prior to a recommendation for criminal prosecution" (slip op., p. 19, emphasis added).

Since the summonses were validly issued and should have been complied with, it follows that they should be enforced.[1] Otherwise, litigious delay in complying with valid summonses would be encouraged and, except in situations where limitations periods are nearing expiration, the government would be discouraged from attempting to instigate criminal proceedings as promptly as feasible, in the spirit of the constitutional guaranty of a speedy trial. Moreover, if criminal proceedings are actually brought against any of the petitioners, there will be an opportunity at the trial to hear any claim they may have that particular evidence should be excluded because of abuse of process (see *Donaldson*, slip op. at 14).

Nor does the fact that criminal prosecution of two of the petitioners has been recommended render the summons enforcement proceedings effectively moot as to them. As the Court recognized in *Donaldson*, internal revenue summonses are not used exclusively for the purpose of determining whether criminal proceed-

[1] See *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2), certiorari denied, 373 U.S. 902, and *United States* v. *Moriarity*, C.A. 7, No. 18446, decided December 22, 1970, holding that internal revenue summonses which were valid when issued should be enforced even though an indictment has been returned during the course of the enforcement litigation. But see *United States* v. *Monsey*, 429 F. 2d 1348 (C.A. 7), an earlier opinion by a different panel of the Seventh Circuit with respect to a related issue of discovery in an enforcement proceeding.

ings should be recommended; the investigation is also directed to determining civil tax liability. Enforcement of validly issued summonses is therefore appropriate to complete the civil investigation authorized by Congress and, in a case like the present one in which an indictment has not yet been sought, the information obtained might also affect the determination of whether to seek an indictment.

It remains our view, therefore, that certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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